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The commercial interests of Great Britain and the other maritime Powers being as extensive as they are in the united oceans, why not return to the original idea of dedicating the connecting water-way to the peaceful commerce of the world, under the guarantee of its permanent neutrality by the United States and all the nations using the Isthmian Canal, in recognition of the freedom of the seas, the gospel of commerce and the solidarity of mankind?

But, in any event, if we cannot agree with Great Britain on the true meaning and intent of the Hay-Pauncefote Treaty, let us rid ourselves of the unworthy fear that impartial arbitrators cannot be found—a fear which our own experience with international arbitration does not justify—and submit our differences to this peaceful method of settlement, as we have bound ourselves by treaty to do.

THE CHAIRMAN. The printed program will be resumed later, and in the meantime, a paper by Mr. Chandler P. Anderson, recent Counsellor for the Department of State, will be read on the issues based upon the diplomatic correspondence.

# THE ISSUES BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO PANAMA CANAL TOLLS, AS RAISED IN THE RECENT DIPLOMATIC CORRESPONDENCE.

ADDRESS OF HON. CHANDLER P. ANDERSON, *formerly Counsellor for the Department of State.*

It has seemed desirable to the committee in charge of the program for this meeting of the Society that, as a preliminary to the discussion of the Panama Canal tolls questions which are included in the program, a brief outline should be presented showing the exact issues between the two governments in that controversy as raised in the diplomatic correspondence, and the arguments which have been advanced on both sides in support of their respective contentions. It is for this purpose, rather than for the purpose of weighing the value of these arguments, that this paper has been prepared.

Before taking up the issues which have been raised in the diplomatic correspondence, it is important to have in mind the following considerations:

Inasmuch as the United States and Great Britain are the only parties to the Hay-Pauncefote Treaty of November 18, 1901, Great Britain alone of all nations is entitled to question the course adopted by the United States under that treaty, but even Great Britain is not entitled under the terms of the treaty to question the course adopted by the United States toward other nations with reference to the use of the canal so long as that course involves no discrimination against Great Britain. Great Britain has no authority under the treaty or otherwise to speak for other nations on the subject of the canal tolls, and is not concerned with the attitude of the United States toward other nations in dealing with this matter except as Great Britain's own interests are affected thereby. The attitude of the United States toward other nations will unquestionably be that best adapted for securing their observance of the rules adopted by the United States for the use of the canal, the purpose of which rules is to carry out the traditional policy of the United States for the neutralization of the canal. In this connection, however, it is of interest to note that there is nothing in the treaty which would prevent the United States from granting equal treatment to any other nation even if that nation does not observe the rules, the observance of which would ensure equal treatment. Moreover, it is open for the United States to make with any other nation any arrangement which is mutually agreeable on the subject, and the only interest of Great Britain therein is that there shall be no discrimination against British interests.

It is clear from these considerations that any discussion between Great Britain and the United States on the subject of canal tolls must be limited to the question of discrimination against British vessels, and it will be found upon examining the diplomatic correspondence that this limitation has been recognized by Great Britain.

There has apparently been considerable confusion in the widespread discussion about canal tolls which has been going on for the past eight months in this country as to the exact contentions of both governments and the real question at issue between them. A large part of this discussion has been directed to the question of whether the United States is not at liberty under the treaty to do what it pleases in regard to the payment of tolls by its own vessels in its own canal. As a matter of fact, this contention is not made by Great Britain, and there is nothing in the treaty which would justify any such contention. The United States is clearly entitled to exempt its

own vessels, either of war or of commerce, whether engaged in the coastwise or foreign trade, from the payment of any tolls, and likewise it is entitled to refund tolls exacted from those vessels. The question at issue is not whether that can be done, but whether the United States, having exempted its own vessels from the payment of tolls, is at liberty under the treaty to exact tolls from British vessels so long as Great Britain observes the rules adopted by the United States in the treaty.

That issue is not one which should arouse bad feeling or justify the charge of bad faith on either side, for it involves at most only a question of pecuniary damages, and does not present a situation under which the United States would gain any advantage by postponing its settlement until after the canal is opened. If it should finally appear that under the treaty the United States was not entitled to impose tolls upon British vessels when United States vessels are not subjected to the same treatment, Great Britain would have a claim against the United States for the amount of the tolls improperly paid by British vessels. Clearly, therefore, it is not a case where an immediate settlement is necessary in order to prevent an irreparable injury, for there can be no irreparable injury in enforcing a law when the damages can be measured by the payment of money improperly collected. Obviously it would be more convenient for the United States to have this question determined before the canal is opened and before tolls are collected, which would have to be refunded if this question should be decided against the United States; but even if it should be so decided, either before or after the canal is opened, in either case it would remain for the United States alone to determine whether equality of treatment should be secured by imposing equal tolls upon American vessels or by exempting British vessels equally with the American vessels from the payment of tolls.

The fundamental question underlying this controversy is whether or not the rules adopted by the United States under Article III of the Hay-Pauncefote Treaty "as the basis of the neutralization of the canal" were intended to apply to the United States as well as to other nations.

If these rules are understood as not applying to the United States, then their adoption by the United States is nothing more than a declaration of policy to the effect that the United States will so regulate and manage the canal, under the authority reserved in Article II, as to

insure, in accordance with the first of these rules, that "the canal shall be free and open to the vessels of commerce and of war of all nations *observing these rules*, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise," and also that "such conditions and charges of traffic shall be just and equitable."

This is the interpretation which the Government of the United States has accepted as expressing the true intent and meaning of this treaty, the effect of which under this interpretation has been aptly described as insuring to other nations "conditional favored-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the United States gives to its own nationals, but the treatment which it gives to other nations."

Great Britain, on the other hand, although apparently admitting that none of the other rules adopted by the United States as the basis of neutralization apply to the United States, nevertheless contends that the first of these rules does apply to the United States as well as to other nations, and that by adopting it the United States has imposed upon itself an obligation to treat its own vessels and the vessels of any nation observing these rules on terms of entire equality, "so that there shall be no discrimination against any such nation, or its subjects or citizens," etc. In contending for this interpretation, however, Great Britain has recognized the necessity for determining what constitutes discrimination and particularly whether or not inequality of treatment in favor of vessels of war of the United States and of vessels of commerce engaged in the coasting trade of the United States would constitute discrimination against British vessels under this clause.

So far as other nations are concerned the British position is understood to be that this clause "embodies a promise on the part of the United States that the ships of all nations which observe the rules will be admitted to similar privileges" as enjoyed by the ships of the United States and Great Britain.

In support of the British contention that the words "all nations observing these rules" as used in Rule 1 include the United States, and therefore that British vessels using the canal are entitled to equal treatment with those of the United States, the only argument advanced by Great Britain is that the general principle of neutralization

established by Article VIII of the Clayton-Bulwer Treaty, as the basis of which principle the United States adopted these rules, is in effect nothing more than a general principle of equality of treatment.

Before taking up this argument it is necessary to examine briefly the provisions of Article VIII of the Clayton-Bulwer Treaty, and trace their connection with the present treaty. Article VIII of the Clayton-Bulwer Treaty recites:

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a *general principle*, they hereby *agree to extend their protection, by treaty stipulations*, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America.

The first seven articles of that treaty related exclusively to inter-oceanic communications across Central America, and it was distinctly understood by Great Britain in making that treaty that the Isthmus of Panama was not regarded as a part of Central America. This article of the treaty, therefore, is the only part of the treaty which had any relation to a canal across the Isthmus of Panama. The significance of this is that this article expressed the only rights Great Britain ever had in relation to the Panama Canal route, so that Great Britain has actually sacrificed nothing by abrogating the rest of the Clayton-Bulwer Treaty. In other words, if the Clayton-Bulwer Treaty were in force today Article VIII is the only part of it which would apply to the Panama Canal, and in so far as the effect of Article VIII has been changed by the Hay-Pauncefote Treaty, it will be found that these changes have been made at Great Britain's suggestion.

The article then continues—

In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

It is evident from this clause of the article that the agreement to extend protection was a conditional one, and the condition was that charges imposed on traffic should be approved by both governments as just and equitable, and that the canal should be open to their citizens and subjects upon equal terms.

It is clear that the right to equal treatment went hand in hand with the obligation to extend protection, but the general principle established by this article related primarily to the protection of the canal, the object being to secure its neutralization, and as an inducement to granting protection it was provided that equality of treatment should go with it. Clearly neutralization as used there meant exemption from interference, and equality of treatment was only incidental as an inducement to non-interference.

That both governments understood that neutralization rather than equality of treatment was the general principle adopted by Article VIII of the Clayton-Bulwer Treaty is evident from the fact that the preamble of the Hay-Pauncefote Treaty of 1901, as well as the preamble of the earlier treaty of 1900, characterized that general principle as "the general principle of neutralization established in Article VIII of that convention." The connection established by Article VIII of that convention between the obligation to protect the canal and the right to equal treatment is also recognized and carried into the first Hay-Pauncefote Treaty of 1900 by the second article of that treaty, which provides:

The high contracting parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer convention, adopt as the basis of such neutralization the following rules, etc.

The first of these rules is as follows:

The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

It will be observed that in this treaty Great Britain joined with the United States in adopting rules which were to furnish the basis of neutralization, so that in that case both governments were equally com-

mitted to the neutralization of the canal, and the rules recognized that in consequence of such joint obligation the vessels of both governments were entitled to equal treatment. As part of this policy of coupling equal treatment with the obligation of protection, that treaty also provided in Article III that—

The high contracting parties will, immediately upon the exchange of the ratifications of this convention, bring it to the notice of the other powers and invite them to adhere to it.

That treaty, it will be remembered, was rejected by the United States Senate, and was subsequently amended materially before it was agreed upon in its present form. Certain of these amendments are of the utmost significance in connection with the questions under consideration, and show conclusively that the policy which had previously been adopted with respect to the protection of the canal was completely reversed by the later treaty. The article of the earlier treaty requiring the two parties to bring it to the notice of other Powers and to invite them to adhere to it was entirely omitted from the new treaty. This provision had been objected to by the Senate, and was omitted for that reason, and in consequence of its omission Great Britain insisted upon being relieved from the obligation of protecting the canal, which it had assumed in joining with the United States in adopting the rules of neutralization. The reason for relieving Great Britain of this obligation is found in a statement made by Lord Lansdowne in an instruction by him to Lord Pauncefote in the course of the negotiations wherein he says, in effect, that the amendment striking out the provision for the adherence of other Powers leaves the neutrality of the canal dependent upon the guarantee of the two contracting Powers, which would place Great Britain at a marked disadvantage in comparison with other Powers which would not be subjected to the self-denying ordinances which Great Britain is desired to accept. Accordingly the treaty was further amended so that the United States alone, instead of the United States and Great Britain jointly, adopted the rules of neutralization, and that this change was intended to relieve Great Britain of any obligation to protect the canal is evident from the position taken by the British Government in the recent diplomatic correspondence, in the course of which it is stated—



It certainly was not the intention of His Majesty's Government that any responsibility for the protection of the canal should attach to them in the future.

In this connection it will be remembered that the Hay-Pauncefote Treaty was entered into pursuant to Article VIII of the Clayton-Bulwer Treaty, whereby, in order to establish a general principle, they agreed "to extend their protection by treaty stipulations to any other practicable communications" which included the Panama Canal as now constructed. The obligation to protect, as has already been shown, was conditional upon equality of treatment, and Great Britain's repudiation of responsibility for the protection of the canal would seem to be wholly inconsistent with the stipulations of Article VIII above-mentioned, unless it was understood that Great Britain was not to receive equal treatment with the United States under the new treaty.

The changes by which the United States alone adopted the rules, and thereby undertook the whole responsibility of upholding them and maintaining the neutralization of the canal, made some changes in the rules themselves necessary. It appears from the diplomatic negotiations which resulted in the second Hay-Pauncefote Treaty that in order to make Rule 1 conform to the situation resulting from the amendments above noted, Great Britain had suggested that in Rule 1, after the words "all nations" there should be inserted the words "which shall agree to observe these rules," so that Rule 1 would then read:

The canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules.

Clearly the United States, as the nation which adopted the rules, was the nation with which the agreement to observe them would necessarily be made, and therefore it is evident that in proposing this amendment Great Britain understood that as a result of the proposed amendments the United States, as the nation adopting these rules, would stand apart from all other nations, and that "all nations" referred to in these rules did not include the United States. The exact form of amendment thus proposed was not agreed upon, but instead of the words "all nations which shall agree to observe these

rules" the words "all nations observing these rules" were substituted. With reference to this change, Lord Lansdowne made the following statement in the course of the negotiations:

His Majesty's Government were prepared to accept this amendment which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other powers, while they [the United States] stopped short of conferring upon other nations a contractual right to the use of the canal.

Having thus briefly reviewed the development of the policy of neutralization as established in Article VIII of the Clayton-Bulwer Treaty and as understood by the parties in the later negotiations resulting in the second Hay-Pauncefote Treaty, it is convenient now to examine the argument which has been advanced by Great Britain to show that the policy of neutralization adopted by the United States in this treaty imposes upon the United States the obligation to treat British and United States vessels upon equal terms in the use of the canal. The argument briefly is that the word neutralization, as used in Article III, has the same sense as in the preamble of the treaty which recites that both governments are desirous of facilitating the construction of the canal "without impairing 'the general principle' of neutralization established in Article VIII" of the Clayton-Bulwer Treaty, which policy of neutralization is admitted to have comprehended both equality of treatment and the obligation to protect the canal, and that inasmuch as Great Britain has now been relieved from any responsibility for the protection of the canal, neutralization must therefore refer in the treaty to a system of equal rights; therefore the United States can have no more rights than other nations, and consequently is one of the nations required to observe the rules adopted by the United States, so that Great Britain and the United States are in the same situation, and British vessels are entitled to equal treatment with the vessels of the United States.

As stated at the outset, it is not the purpose of this paper to weigh the value of the arguments advanced on either side, but in any event it would be premature to attempt to deal fully with the arguments on this point, because the Government of the United States has not as yet stated the arguments relied upon to support the position which it has taken in opposition to the British contentions. The reply of

the Government of the United States to the British argument so far has been confined to the statement by Secretary Knox, in the recent correspondence on the subject, that—

This Government does not agree with the interpretation placed by Sir Edward Grey upon the Hay-Pauncefote Treaty, or upon the Clayton-Bulwer Treaty, but for reasons which appear hereinbelow it is not deemed necessary at present to amplify or reiterate the views of this Government upon the meaning of those treaties.

The conclusion reached by Great Britain, as above stated, that the same treatment extended to American vessels should be extended to British vessels, has been made the basis by Great Britain for objecting to certain features of the Panama Canal Act adopted by Congress last year; and the views of the British Government in support of these objections have been fully presented in the recent diplomatic correspondence.

It appears from this correspondence that apart from a reservation made by Great Britain of the right to examine further one provision of the Act and to raise such contentions as may seem justified only three objections are made, which may be briefly stated as follows:

(1) That under the Act no tolls are to be levied upon ships engaged in the coastwise trade of the United States.

(2) That the Act appears to confer upon the President authority in fixing tolls to discriminate in favor of ships belonging to the United States and its citizens as against foreign ships.

(3) That the Act exempts from the payment of tolls the vessels of the Republic of Panama, pursuant to the provisions of Article XIX of the treaty of 1903 between the United States and Panama.

The reply of the United States to these objections has been fully stated in Mr. Knox's note on the subject, dated the 17th of January last. It appears from that note that the position of the United States with reference to the third of the objections above enumerated is that, for reasons which depend upon considerations outside of the terms of the treaty, this question is one which must be settled between the two governments independently of the treaty provisions. The correspondence does not fully disclose what these reasons are, but apparently they rest upon some previous discussion and understanding between the two governments with regard to the subject which have not yet been made public, and it is therefore impossible to

discuss here the arguments in support of the position of either government on this point.

With reference to the other two objections, the United States has taken the position that, if it is right in its contention that Rule I does not apply to American vessels, then the exemption from tolls of its coastwise trade and its ships of war and even its ships of commerce engaged in foreign trade would not be contrary to its treaty obligation. As has already been stated, the argument of the United States in support of this position has not as yet been presented, because it appeared to the Government of the United States that even if Rule I should be regarded as applying to American vessels, nevertheless Great Britain had failed to show that under the provisions of the Canal Tolls Act and the President's proclamation there was or would be any discrimination against British vessels.

In regard to the objection that under the Act the President had discretion to discriminate in favor of ships of the United States or its citizens, the reply of the United States was that this as yet had not been done, and that it would be premature to discuss that question so long as it rested merely on a possibility of what might happen rather than upon an announced intention to discriminate, or some specific act of discrimination.

In this connection the United States raised the question of whether the objection under consideration was to be understood as applying to war vessels and government vessels of the United States, and the British position on this question has not yet been announced. The significance of this question is that if Great Britain admits that Rule I does not apply to United States war vessels it amounts to an admission that it does not apply to United States vessels of commerce, for vessels of war and vessels of commerce are put on precisely the same footing in Rule I. Clearly, however, there is no point in collecting tolls from the United States vessels of war, inasmuch as their payment would be merely a matter of bookkeeping in the government accounts. Moreover, Great Britain has already admitted that the rest of the rules adopted by the United States in Article III, which chiefly relate to war conditions, do not apply to the United States, and it is perhaps difficult for Great Britain to establish a distinction justifying the application of Rule I to the United States and the application of the rest of the rules only to other nations.

In reply to the first objection—that under the Act no tolls are to be

levied upon ships engaged in the coastwise trade of the United States—the position taken by the Government of the United States was that, in view of the fact that no foreign vessels were permitted to engage in the coastwise trade of the United States, an exemption of American vessels engaged in that trade was in no sense a discrimination against foreign vessels so long as this exemption was restricted to bona fide coastwise trade. Great Britain has admitted that the United States is at liberty to grant a subsidy to its vessels whether engaged in coastwise or foreign trade, and apparently has admitted in principle that a subsidy may be granted indirectly by an exemption from the payment of tolls if that should be done without producing an increase in the rate of tolls imposed upon British vessels; but it is contended by Great Britain that “if any classes of vessels are exempted from tolls in such a way that no receipts from such ships are taken into account in the income of the canal there is no guarantee that the vessels upon which tolls are being levied are not being made to bear more than their fair share of the upkeep.” In making this contention the British Government apparently was under the impression that the President, in determining the rate of tolls, would not take into account the tonnage of American coastwise vessels, and therefore that the toll rate would be higher than if those vessels were subjected to the payment of tolls. That the British Government was under a misapprehension with regard to this matter has been clearly shown by the reply of the United States, which pointed out “that the tolls which would be paid by American coastwise vessels, but for the exemption contained in the Act, were computed in determining the rate fixed by the President,” and the figures are given showing that the estimated net tonnage upon which the tolls fixed in the President’s proclamation were based included the tonnage of American coastwise vessels.

For these reasons the Government of the United States contended that there had as yet been no discrimination, and that there was nothing in the situation to show that the United States intended to discriminate against British vessels, either by subjecting them to inequality of treatment or by imposing upon them unjust and inequitable tolls.

From the foregoing brief outline of the issues and arguments presented in the diplomatic discussion of this controversy it will be seen that it is still an open question as to whether the two governments

cannot harmoniously settle their differences with regard to this treaty without resorting to arbitration. Great Britain has proposed arbitration, and the United States has not as yet accepted that suggestion, but it has not refused to do so, having taken the position that the issues between the two countries should first be more clearly defined, and that arbitration at present would be premature, because the controversy has not yet passed beyond the stage when it could profitably be dealt with by diplomatic negotiation.

To sum up the whole situation, the United States and Great Britain differ as to the meaning and effect of the treaty in its relation to certain features of the Panama Canal Act. Great Britain has asked that these differences should be settled by arbitration, and the United States has replied that there is as yet no necessity for resorting to arbitration, for even under Great Britain's interpretation of the treaty it is believed that they have failed to make out a case showing any violation of treaty obligations. In other words, the United States in effect has interposed a demurrer to the British complaint and contended that even under the British interpretation of the Hay-Pauncefote Treaty the provisions of the Panama Canal Act, when taken in conjunction with the President's proclamation, are not in conflict with that treaty; and that the objections advanced by Sir Edward Grey do not present any questions which, under the terms of our arbitration treaty with Great Britain, can fairly be regarded as requiring submission to arbitration at the present stage of the discussion.

The CHAIRMAN. The next matter interpolated into the printed program is a paper by Mr. Richard Olney, whom we all remember as the former Secretary of State. Mr. Olney's paper will be read by Mr. Walter S. Penfield, of the Bar of the District of Columbia.

## PANAMA CANAL TOLLS LEGISLATION AND THE HAY-PAUNCEFOTE TREATY.

ADDRESS OF HONORABLE RICHARD OLNEY, *formerly Secretary of State.*

In construing the Hay-Pauncefote Treaty it is necessary to remember that there have been several different phases of American opinion and American policy touching the ownership, construction, maintenance, and use of the canal. The canal has always been conceived of as a work of world-wide interest and importance, which all nations